

REMARKS

Claims 1-43 are pending in this application. Applicants have elected with traverse to proceed with Claims 1-6, 17-26, and 43. Claims 7-16 and 27-42 have been withdrawn. No claims have been canceled or added. Claims 1, 4, 6, 17, 23, 25, and 43 have been amended. Also, an Affidavit of Russell Carl Hoseney under 37 CFR 1.132 ("Hoseney Affidavit") is submitted herewith to overcome the rejections by Examiner, and said Affidavit is incorporated herein for all purposes. Reconsideration and allowance of all the claims are respectfully requested.

Election/Restrictions

Examiner states in his Office Action as follows:

During a telephone conversation with William Wang on January 6th, 2005, a provisional election was made with traverse to prosecute the invention of Group I, claims 1-6, 17-26, and 43. Affirmation of this election must be made by applicant in replying to this Office action. Claims 7-16 and 27-42 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

As requested, Applicants hereby affirm their election with traverse of Group I claims, claims 1-6, 17-26, and 43.

Claim Rejections - 35 USC §112

Examiner states in his Office Action as follows:

Claim 1 is rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the enablement requirement.

This claim recites corn chip regrind having "an ash content that is higher than the normally found in consumable corn chips." The specification does not provide guidance as to what "normal" ash content is and one of ordinary skill in the art would not know exactly what applicant means to include with this language.

Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is not clear as to what is included by the language "higher than normally found in consumable corn chips."

Applicants respectfully traverse Examiner's rejection of Claim 1 under 35 USC 112.

Claim 1 as amended no longer contains the previously-objected-to language. Applicants therefore request that the rejection of Claim 1 under 35 USC 112 be withdrawn.

Claim Rejections - 35 USC §102

Examiner states in his Office Action as follows:

Claims 26 and 43 are rejected under 35 U.S.C. §102(b) as being anticipated by "Salmon Patties." "Salmon Patties" discloses a toasted flavor additive comprising a plurality of ground particles of a toasted product, wherein the toasted product comprises corn chips (page 3).

Applicants respectfully traverse the rejection of Claims 26 and 43 under 35 USC 102(b).

Such rejection under §102 for anticipation requires that the single reference teach each and every element or step of the rejected claim. *See Atlas Powder v. E.I. DuPont*, 750 F.2d 1569 (224 USPQ 409) (Fed. Cir. 1984); *See also* MPEP § 2131.01 ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference"). Examiner's rejections under §102 fail to meet this test.

As correctly noted by Examiner on page 5 of the Office Action dated January 26, 2005, "Salmon Patties" does not disclose the moisture content or the oil content of the corn chips. "Salmon Patties" therefore does not anticipate the invention in Claim 26. The "toasted corn flavor additive made from the method of Claim 17," as claimed in Claim 26, requires "a natural oil content ranging from about 2.0% to about 5.0% by weight." This limitation is clearly stated in step e) of Claim 17 as amended. Similarly, Claim 43 as amended requires a toasted product "having no added oil, added seasoning, or added preservatives." As stated on page 3 of "Salmon Patties" by

'Pat': "These are very tasty but are packed with sodium due to the corn chips" (referring to crushed corn chips – specifically Fritos® brand corn chips). It is therefore quite clear that the corn chips used in "Salmon Patties" have a significant amount of added salt (seasoning/preservative), as do virtually all commercial corn chip products. Because "Salmon Patties" does not disclose all limitations of Claims 17 and 43, Applicants request that the rejection of those claims under 35 USC 102(b) be withdrawn.

Claim Rejections - 35 USC §103

Examiner states in his Office Action as follows:

Claims 1, 4, 5, and 6 are rejected under 35 U.S.C. §103(a) as being unpatentable over "Salmon Patties" in view of Ellis et al., U.S. Patent 4,806,37 [sic].

In regard to claims 1, 4, and 5, "Salmon Patties" discloses a recipe that calls for the grinding of corn chips (page 3) and the addition of the regrind to food. "Salmon Patties" does not disclose the moisture content or the oil content of the corn chips. Ellis discloses corn chips with a moisture content of less than 2% by weight (column 3, lines 47-50) and an oil content of 2-30% by weight (column 2, lines 34-39). "Salmon Patties" suggests the use of Fritos, but it is expected that any corn chips would suffice and therefore, it would be obvious to use the corn chips of Ellis to make the regrind used in "Salmon Patties." . . .

In regard to claim 6, "Salmon Patties" does not disclose the L-value of the crushed corn chips. However, it would have been expected for the corn chips of "Salmon Patties" to have an L-value less than that of dry masa dough, as claimed by applicant, since the corn chips of "Salmon Patties" are made by toasting and frying masa dough and both of these processes are known to make foods darker which in turn decreases the L-value.

Claims 2 and 3 are rejected under 35 U.S.C. 103(a) as being unpatentable over in view of [sic] "Salmon Patties" in view of Ellis et al., U.S. Patent 4,806,37 [sic], as applied to claim 1, 4, 5, and 6 above, in further view of "A Dinner Experiment" and "Dried Food Products." "Salmon Patties" does not disclose the size of the ground corn chip particles. However, "A Dinner Experiment" discloses the placing of corn chips in food processor and chopping them until very fine (page 8) and it is expected that once chopped, the particles would be within the sizes claimed by applicant. Additionally, other food additives, such as garlic granules, are sold with particles [sic] sizes within the ranges claimed by applicant, as evidenced by "Dried Food Products," and as such, it would be obvious to chop the corn chips until the particle sizes were between 26 and 40 mesh.

Claims 17-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over "Food Product Design" in view of "Salmon Patties" and Ellis et al.

In regard to claims 17-25, methods of making corn chips were well known to one of ordinary skill in the art, as evidenced by "Food Product Design" (page 3). "Food Product Design" . . . discloses the frying of the toasted flavor pieces after toasting in a triple-pass gas-fired oven, which utilizes both convective heat and infrared radiation (page 3). "Food Product Design" does not disclose the moisture content or oil content of the chips and also does not disclose the grinding of the chips. However, Ellis discloses corn chips with a moisture content of less than 2% by weight (column 3, lines 47-50) and an oil content of 2-30% by weight (column 2, lines 34-39) and it would therefore have been obvious to use the method of "Food Product Design" to make chips with low moisture and oil content as taught by Ellis in order to provide chips with reduced fat content. "Salmon Patties" discloses the grinding of corn chips (page 3) for use as filling material in a food product. It therefore would have been obvious to rind the corn chips made by the method of "Food Product Design" for use as a coating or filler with food products. . . .

This rejection is respectfully traversed. None of the cited references, alone or in combination, discloses or suggests the invention claimed. Section 706.02(j) of the MPEP states that "[t]o establish a *prima facie* case of obviousness . . . the prior art reference (or references when combined) must teach or suggest all the claim limitations." Furthermore, there is no suggestion or incentive to combine the references. As stated in Section 706.02(j) of the MPEP, "there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings."

Regarding claims 1, 4, 5, and 6 as amended, Applicants submit that it would not have been obvious to use the corn chips of Ellis to make the regrind used in "Salmon Patties." Applicants' additive as claimed in claims 1, 4, 5, and 6 comprises "a regrind of toasted, sheeted, freshly-made masa dough derived from ground whole corn kernels, wherein said regrind has a natural oil content of about 2.0% to about 5.0% by weight." Unlike Applicants' regrind of toasted, sheeted masa dough having about 2.0-5.0% oil, the

Fritos® brand corn chips used in “Salmon Patties” are fried, extruded, snack pieces having an oil content of approximately 30%, which is more than 6-times that of Applicants’ regrind. Moreover, Ellis teaches away from the Applicants’ requirement that the regrind have a natural oil content of about 2.0% to about 5.0%. Ellis strongly implies that the natural oil content of masa dough is insufficient and results in an undesirable product, thus Ellis teaches that additional oil should be applied. For example, Ellis teaches in lines 6-13 of column 4, “For enhanced organoleptic appeal, additional oil, preferably between about five and thirty weight percent . . . [m]ore preferably, between about five and fifteen weight percent oil is applied to the baked product.” Furthermore, every embodiment of baked masa product in Ellis teaches that additional oil be applied (see, for example, Ellis examples 5-7). Ellis clearly teaches away from Applicants’ claim limitation of no added oil. Thus, as also explained in the attached Hoseney Affidavit, it would not have been obvious to one skilled in the art to combine and/or modify the teachings of “Salmon Patties” and Ellis to arrive at Applicants’ claimed additive.

Regarding claims 2 and 3, there is no suggestion to modify and/or combine the teachings of “Salmon Patties,” “A Dinner Experiment,” or “Dried Food Products” to arrive at Applicants’ claimed invention. Claims 2 and 3 incorporate all limitations of claim 1, which requires a regrind of toasted, sheeted masa dough having a natural oil content about 2.0-5.0%. In contrast, “A Dinner Experiment” teaches on page 8 that “corn tortilla chips, fried crisp” be used. As previously explained, commercial fried corn chips typically have oil content on the order of 30%, which is significantly greater than Applicants’ 2.0-5.0%. In addition, “Dried Food Products” fails to disclose or suggest making a regrind of toasted, sheeted masa dough having a natural oil content about 2.0-5.0%, and wherein the regrind particles have mesh sizes between about 20 and about 50.

While “Dried Food Products” does discuss various mesh sizes vegetable powders, there is no mention or suggestion of any powders having 75% of particles between 26 and 50 mesh sizes, as required in claims 2 and 3. Furthermore, “Dried Food Products” relates to powders of garlic, ginger, onion, and horseradish powder; there is no mention or suggestion of corn products. In light of these arguments, Examiner is respectfully invited to withdraw the rejection of claim(s) 2 and 3.

Regarding claim 4 as amended, none of the cited references, alone or in combination, discloses or suggests the additive of claim 1 wherein said regrind has a dimethyl-ethyl-pyrazine (DMEP) concentration of at least about 0.23 ppm. The amendment to claim 4 is supported by Applicants’ Specification. As shown in Figure 5 and as explained in Applicants’ Specification on page 28, the two TCF-enhanced samples (#530 and #540), both exhibited more than double the DMEP concentration in untoasted dry masa chips (#520). Upon inspection, one can see that, in order for the small percentage of TCF additive to increase DMEP levels to more than double the original amount, the toasted corn flavor additive used in the TCF-enhanced samples (#530 and #540) must have had DMEP concentrations greater than that in standard toasted tortilla chips (#510), roughly 0.23 ppm. As explained in the Specification, TCF additive generally ranges between about 0.1% to about 10% by weight (page 24). Hypothetically, even if a sample of untoasted dry masa chips (#520, 0.0233 ppm DMEP) were modified to contain as high as 10% ground particles of standard toasted tortilla chips (#510, 0.2335 ppm DMEP), the modified mixture would have an overall DMEP concentration of about 0.0443 ppm. Both TCF-enhanced samples (#530 and #540) had higher DMEP concentrations (0.0476 ppm and 0.0508 ppm, respectively). Thus, it is clear that the TCF additive must have a DMEP concentration greater than about 0.23 ppm.

Regarding claims 17-25, Applicants submit that it would not have been obvious to combine and/or modify the teachings of “Food Product Design,” “Salmon Patties,” and Ellis to arrive at Applicants’ claimed method for making a toasted corn flavor additive. Applicants’ method results in an additive having a natural oil content ranging from about 2.0% to about 5.0% by weight. Unlike Applicants’ powder/regrind of toasted, sheeted masa dough having about 2.0-5.0% oil, the Fritos® brand corn chips used in “Salmon Patties” are fried, extruded, snack pieces having an oil content of approximately 30%, which is more than 6-times that of Applicants’ regrind. Moreover, Ellis teaches away from the Applicants’ requirement that the powder/regrind have a natural oil content of about 2.0% to about 5.0%. Ellis strongly implies that the natural oil content of masa dough is insufficient and results in an undesirable product, thus Ellis teaches that additional oil should be applied. For example, Ellis teaches in lines 6-13 of column 4, “For enhanced organoleptic appeal, additional oil, preferably between about five and thirty weight percent [m]ore preferably, between about five and fifteen weight percent oil is applied to the baked product.” Furthermore, every embodiment of baked masa product in Ellis teaches that additional oil be applied (see, for example, Ellis examples 5-7). Ellis clearly teaches away from Applicants’ claim limitation of no added oil. “Food Product Design” also teaches away from Applicants’ requirement that the oil content be naturally-occurring with no added oil. “Food Product Design” teaches on page 4: “In the case of a baked chip, there’s no residual oil on the surface, so a light oil application or a starch, gum or other tacky coating . . . must be applied to allow the seasoning to adhere.” Moreover, while the color of the additive may not always be determinative of the toasted note (or flavor), it is one of several factors contributing to the

toasted flavor. Thus, the observed difference in L-values helps confirm the presence of a distinguishable flavor.

Thus, as also explained in the attached Hoseney Affidavit, it would not have been obvious to one skilled in the art to combine and/or modify the teachings of “Food Product Design,” “Salmon Patties,” and Ellis to arrive at Applicants’ claimed method.

In light of the above, Applicants respectfully request that Examiner withdraw the rejection of Claims 1-6 and 17-25 under 35 USC 103(a).

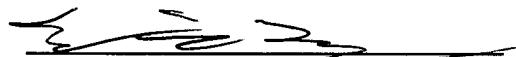
CONCLUSION

In light of the amendments and the arguments made by Applicants above, as well as the evidence submitted by Applicants in the form of the Affidavit of Russell Carl Hoseney attached herewith, Applicants submit that all existing claims are now in a condition for allowance. Applicants respectfully request that Examiner withdraw all restrictions and rejections with regard to the above-referenced claims in reliance on one or more of the grounds submitted by Applicants.

If there are any outstanding issues that the Examiner feels may be resolved by way of telephone conference, the Examiner is invited to call Colin Cahoon or William Wang at the below-listed telephone number if in the opinion of the examiner such a telephone conference would expedite or aid the prosecution and examination of this application.

The Commissioner is hereby authorized to charge any payments that may be due or credit any overpayments to CARSTENS & CAHOON, L.L.P. Deposit Account 50-0392.

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